***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Original - Affidavit of Mailing

# 74-1380

*To be argued by*
THOMAS R. MAHER

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 74-1380**

P/S

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

RODNEY R. HILL,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


EDWARD JOHN BOYD V,
*United States Attorney,*
*Eastern District of New York.*

RAYMOND J. DEARIE,
THOMAS R. MAHER,
*Assistant United States Attorneys*
*Of Counsel.*

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## BRIEF FOR THE APPELLEE

### Preliminary Statement

Rodney R. Hill appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a one day trial before the Honorable Mark A. Costantino, sitting without a jury.

The indictment charged Hill in two counts with having continuously failed to report for an Armed Forces pre-induction physical from August 20, 1970 to May 24, 1973 and failure to report for induction from November 2, 1970 to May 24, 1973, the date of the indictment.

Hill was sentenced on March 15, 1974 to two years imprisonment, all but four months of which were suspended, and appellant was placed on probation in accordance with Title 18, United States Code, Section 3651. Appellant is on bail pending this appeal.

Appellant does not challenge the sufficiency of the Government's evidence which established that he willfully failed to report for a pre-induction physical and induction during the time charged. Appellant now contends for the first time that the Government's prosecution was "invalid" because the Selective Service, he argues, acted in an arbitrary and capricious manner. In support of his argument, appellant claims that the Government agreed prior to trial to suspend the prosecution if appellant would submit to induction. Appellant insists that his attempts at induction were frustrated by the arbitrary and capricious actions of the Selective Service Board.

## Statement of the Case

Appellant registered with Local Board No. 56 in Long Island City in 1964. He immediately received a student deferment (2-S) which he enjoyed until January 1968 when he was re-classified 1-A.

On January 31, 1968, appellant requested an occupational deferment in light of his employment as a Recreation Specialist at the Kilmer Job Corps Center in Edison, New Jersey. This request was granted for one year until February 1969.

In January 1969, appellant advised Local Board No. 56 that he was then employed by the SEEK Program of City University as a Resident-Counselor-Lecturer. Appellant's accompanying request for a second occupational deferment was also granted until February 1970.

Local Board No. 56 again re-considered appellant's classification in January 1970. At that time, a Current Information Questionnaire was sent to appellant, but it was never returned to the Board and the Board received no information from the SEEK program. Accordingly, appellant was classified 1-A.



In February 1970, appellant was ordered to report for pre-induction examination. He did not report.* Again, in April 1970, appellant was directed to comply with the pre-induction order. He failed to report, but instead requested a different date. Two new dates were provided appellant and he again failed to appear on both occasions.

Thereafter, on October 16, 1970, appellant was ordered to report for induction on November 2, 1970. He did not report. However, appellant was given additional opportunities to report for induction in 1971 and 1972; again, he failed to report.

Finally, in January 1973, appellant was questioned by Special Agent Donlan of the Federal Bureau of Investigation concerning his continuing failure to report. Appellant advised Agent Donlan that he was at that time employed at the Addiction Research and Treatment Center in Brooklyn, New York and that his "new life style" would not permit service in the Armed Forces.

Appellant was indicted on May 24, 1973 and arraigned on June 19, 1973 at which time a September 11, 1973 trial date was established.**

Shortly after his arraignment, appellant reported for induction on June 25, 1973. At that time, a written mental examination was administered to appellant. Despite his three years of college education and his varied employment history, appellant scored only 4 out of a possible 100 on the exam. Appellant was immediately found "mentally disqualified" and no further processing was undertaken.

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* Finally, in March 1970, the Local Board received a reply from the SEEK program that appellant terminated his employment with the program on May 31, 1969.

** The Government's Notice of Readiness was filed on June 22, 1973.

Thereafter, the one day trial proceeded as scheduled on September 12, 1973. In a Memorandum Decision, dated January 16, 1974, Judge Costantino found appellant guilty on both counts in the indictment (Appellant's Appendix —C).

## ARGUMENT

Appellant claims that the Selective Service acted in an arbitrary and capricious manner at the time he finally reported for induction in June 1973 following his indictment. Appellant asserts that the failure to provide him with a physical examination, following his failure on the mental examination, deprived him of an opportunity of establishing that a preexisting condition would have in any event precluded his service in the Armed Forces. Appellant also argues that the Government's "initiation" of this prosecution, following his attempt at induction, denied him due process of law. In pursuing this latter argument, appellant alleges for the first time that "the government agreed to suspend its prosecution if he would report" (Appellant's brief, page iii).

At the outset, certain factual misstatements must be corrected. For example, appellant insists that the Government "initiated" this prosecution following his disqualification on the mental examination. The prosecution of appellant was begun with the return of the indictment on May 24, 1973. The record reveals beyond any doubt that since that date the case proceeded without interruption to the eventual trial in September. Appellant was arraigned on June 19th, the Government's Notice of Readiness was filed on June 22nd and trial took place as scheduled on September 12, 1973.

Secondly, appellant's allegation that the Government agreed to suspend prosecution if he would report for induction has absolutely no support in the record below.



Indeed, appellant's claim that the Government somehow breached an agreement was never raised below and is first mentioned on his brief on appeal. Furthermore, appellant's claim that Selective Services acted in an arbitrary and unreasonable manner at the time of his attempted induction was not raised until after trial in appellant's Memorandum of Law in support of his motion for a judgment acquittal.

In view of the timing of appellant's attempted induction, it is apparent, nevertheless, that some informal agreement with the Government was accomplished so as to permit appellant to report for induction following his indictment and arraignment and shortly before the commencement of trial. While the record does not shed light on this agreement because appellant failed to broach this issue below, the Government would note that it agreed only to consider appellant's good faith attempt at induction in deciding whether or not to proceed to trial in September.

In any event, the inadequacies of the record below on this issue present no genuine problem. The events complained of, including the alleged breach of an agreement, all occurred long after appellant's continuing violation and as such become irrelevant, and in no way minimized appellant's continuing refusal to report for pre-induction and induction. *United States* v. *Noonan,* 434 F.2d 582, 584 (3d Cir. 1970, *cert. denied,* 401 U.S. 939 (1971)) (cases cited therein). See also *United States* v. *Hughes,* 364 F. — Supp. 310, 314 (S.D.N.Y. 1973).

Finally, even assuming *arguendo* that the Government did agree to terminate the prosecution if appellant reported for induction, it would appear that the Government's decision to continue the prosecution would be an act of prosecutorial discretion and, therefore, not reviewable. In *United States* v. *Bethea,* 483 F.2d 1024, 1027 (4th Cir.

1973),* there was evidence of an agreement by the Government to dismiss the indictment if Bethea submitted to induction, which he did and was rejected by the Armed Forces. The Fourth Circuit held that this agreement was unenforceable. The court concluded:

> Bethea's conduct was at most only a factor to be considered by the prosecutor in deciding whether or not to prosecute, a decision not reviewable here.

Compare *Santobello* v. *New York*, 404 U.S. 257 (1971).

In this case, there simply was no such agreement, but only an agreement to consider appellant's good faith attempt at induction before deciding to proceed to trial.** Such consideration was given and the Government's decision to proceed was in all respects proper and appropriate.

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* Reversed and remanded on other grounds.

** In this connection, Judge Costantino's findings with respect to appellant's attempt at induction and particularly with respect to appellant's surprisingly low score on the mental examination, should be noted. "This defendant had gone to college for several years and held at least three responsible jobs. When his background is considered in conjunction with his score of four on the mental examination, his continuous failure to obey orders from his Local Board, and his statement to Special Agent Donlan that he would not be inducted, the inescapable conclusion must be that there has been no showing of a bona fide preexisting condition which caused the rejection. The government's refusal to dismiss the indictment was not arbitrary, capricious, or a denial for equal protection" (Memorandum Decision, page 9).



## CONCLUSION

**The judgment of conviction should be affirmed.**

May 23, 1974

Respectfully submitted,

EDWARD JOHN BOYD V,
*United States Attorney,*
*Eastern District of New York.*

RAYMOND J. DEARIE,
THOMAS R. MAHER,
*Assistant United States Attorneys,*
*Of Counsel.*

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 24th day of May 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of brief for the appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Leavy, Shaw & Horne, Esqs.
233 Broadway, Suite 4901
New York, NY 10007

Sworn to before me this
24th day of May 1974

Irene S. Cohen
Notary Public, State of New York
No. 24-0683965
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Deborah J. Amundsen
DEBORAH J. AMUNDSEN